# STATE OF MICHIGAN

# COURT OF APPEALS

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| KEITH MONTGOMERY,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>March 13, 2012 |
| v | No. 300688<br>Wayne Circuit Court |
| LARRY ROSS GARAGE, INC.,<br><br>Defendant-Appellee. | LC No. 09-017460-CZ |

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff, Keith Montgomery, appeals the trial court's order that granted defendant, Larry Ross Garage, Inc.'s motion for summary disposition. For the reasons set forth below, we affirm.

## I. FACTS AND PROCEEDINGS

In July 2008, defendant hired plaintiff as a tow truck driver at its Southfield facility. Steven Hocking, a general manager who worked primarily at defendant's Livonia location, testified that a tow truck driver is a "very dangerous" job, often performed in close proximity to traffic and in hazardous weather conditions. Drivers must be certified through the department of transportation that they are physically able to perform the job and each driver must be able to lift more than 50 pounds. Plaintiff also testified that a tow truck driver must be in good health to perform the job.

Defendant's supervisor gave plaintiff his first formal evaluation on November 3, 2008. Plaintiff received poor evaluation scores for "works steadily and constantly" and "uses time efficiently," he received "average" scores for the majority of the other categories, and he received an overall score of 65 out of 100 points. According to Will Kaczur, the general manager of the Southfield location, plaintiff had problems with his job performance because he did not properly complete inspections of his truck and did not properly maintain his truck. Kaczur did not remember whether he gave plaintiff any written warnings about his performance, but he recalled that he orally warned plaintiff about his performance problems. Hocking testified that plaintiff did not perform his duties around the workplace in between his towing jobs. According to Hocking, he often saw plaintiff standing idle in a corner between his towing responsibilities, when employees were required to perform other tasks around the facility. Hocking testified that either Kaczur or plaintiff's supervisors would talk to plaintiff about these problems.

On April 12, 2009, plaintiff went to Beaumont Hospital complaining of chest pains, dizziness, and numbness on the left side of his body. Plaintiff called his supervisor on Monday and was told to bring in a doctor's note when he returned to work. The hospital released plaintiff on Monday and he was instructed to follow up with his doctor. When he returned to work, plaintiff gave Kaczur a note from his doctor, Jeffrey Lipsky, M.D., that stated "Ok to return to work without restrictions." According to Kaczur, it is standard practice for defendant to call a doctor's office when an employee brings in a note to verify that the note is genuine. Kaczur recalled that Dr. Lipsky said he did not know about the difficult nature of plaintiff's job as a tow truck driver and that plaintiff would need additional medical tests before he should return to work. Kaczur testified that, on Wednesday, April 15, 2009, he told plaintiff he could not return to work until the tests were performed and his doctor released him with no restrictions. However, Kaczur also recalled that he was called away to an emergency involving a tow truck accident and had to end the conversation. Plaintiff testified that he never talked to Kaczur about a medical condition that would interfere with his ability to do his job and it appears that, after Kaczur was called away, plaintiff remained at work and completed his shift.

Dr. Lipsky wrote another note in which he stated that plaintiff could return to work with no restrictions and that no further testing was necessary. However, on Thursday, April 16, 2009, Kaczur called plaintiff before his work shift and told him he was terminated. Kaczur never saw the second note from Dr. Lipsky and, according to plaintiff, Kaczur explained that he was firing plaintiff because he "went over his head" and talked to a more senior manager, a woman named Christina.

Plaintiff drove to the Livonia facility to talk to Hocking and Hocking clarified that it was his decision to terminate plaintiff, not Kaczur's. According to plaintiff, Hocking explained that he was firing plaintiff because he had a stroke and "it would be a danger to others if [plaintiff] had a stroke on the road or something to that effect." Hocking denied that he told plaintiff that the reason for his termination was his stroke, though he testified that plaintiff's supervisor, Patrick Drummond, maintained that plaintiff reported that he had a stroke. Hocking testified that plaintiff was terminated for poor performance and that they made the decision to terminate plaintiff the week before he was admitted to the hospital.

On April 22, 2009, plaintiff wrote a letter to Hocking and asked him to reconsider his termination decision. Plaintiff stated that he was basing his request "on a misconception of my medical condition." The letter further stated:

> Last week I was hospitalized because I was experiencing numbness on my left side. Even though I thought it was a possibility that I had a stroke, according to the tests ordered by my physician, I did not have a stroke. My physician released me to return back to work with no restrictions . . . ."

Defendant did not respond to plaintiff's letter and did not rescind its decision to terminate plaintiff.

On July 16, 2009, plaintiff filed a complaint and alleged that defendant violated the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.* Specifically, plaintiff claimed that defendant regarded him as disabled and terminated him because of his

perceived disability. Thereafter, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) and argued that plaintiff could not establish that defendant regarded plaintiff as disabled under the PWDCRA or that his alleged disability was unrelated to his ability to perform his job. The trial court ultimately agreed with defendant and granted its motion for summary disposition on September 24, 2010.

## II. DISCUSSION

Plaintiff argues that the trial court erred when it granted summary disposition to defendant. As this Court explained in *Buck v Thomas M Cooley Law School*, 272 Mich App 93, 99; 725 NW2d 485 (2006):

> We review de novo a trial court's decision to grant or deny summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A claim under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The reviewing court must consider the affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is appropriate when, except for the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Corley*, [470 Mich at 278]. We also review de novo questions of statutory interpretation. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

Plaintiff brought this action under the PWDCRA which "was enacted with the purpose of ensuring 'that all persons be accorded equal opportunities to obtain employment, housing, and the utilization of public accommodations, services, and facilities.' " *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999), quoting *Stevens v Inland Waters, Inc*, 220 Mich App 212, 216; 559 NW2d 61 (1996). As the *Chiles* Court further opined at 472:

> We read the PWDCRA in light of the primary goal of judicial interpretation, which is to ascertain and give effect to the intent of the Legislature. *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 611; 566 NW2d 571 (1997). Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. *People v Lee*, 447 Mich 552, 557-558; 526 NW2d 882 (1994). Provisions of a statute are not construed in isolation but, rather, in the context of other provisions of the same statute to give effect to the purpose of the whole enactment. *Guitar v Bieniek*, 402 Mich 152, 158; 262 NW2d 9 (1978).

MCL 37.1202 provides, in relevant part:

> (1) Except as otherwise required by federal law, an employer shall not:
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> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position.

"The plaintiff bears the burden of proving a violation of the PWDCRA." *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004). "'To prove a discrimination claim under the [PWDCRA], the plaintiff must show (1) that he is [disabled] as defined in the act, (2) that the [disability] is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute.'" *Id*., quoting *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998).

The PWDCRA defines a disability under MCL 37.1103(d)(i)(A) as, "[a] determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic . . . substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position . . . ." Importantly for this case, a disability also means, "[b]eing regarded as having a determinable physical or mental characteristic described in subparagraph (i)." MCL 37.1103(d)(iii). Plaintiff takes the position that defendant fired him because Hocking believed plaintiff had a stroke and, thus, he was regarded as having a disability that resulted in his termination.

Though defendant presented evidence that the reason for plaintiff's termination was his poor job performance, accepting plaintiff's testimony as true—that Hocking told plaintiff he was terminated because he suffered a stroke—plaintiff's claim nonetheless fails as a matter of law. Plaintiff presented no evidence that defendant or its employees perceived that one of plaintiff's major life activities was substantially limited because of a stroke. See *Chiles*, 238 Mich App at 477 n 4. Though plaintiff appears to argue that the termination itself established that defendant perceived he could not "work," this does not entitle him to relief under the PWDCRA. While "working" may be considered a major life activity, *Lown v JJ Eaton Place*, 235 Mich App 721, 735; 598 NW2d 633 (1999), "the inability to perform a *particular* job does not constitute a substantial limitation." *Chiles*, 238 Mich App at 478 (emphasis in original). Plaintiff presented no evidence that defendant perceived that a stroke prevented plaintiff from performing a wide range of jobs, just that a stroke might substantially impair plaintiff's ability to perform the job of tow truck driver. *Id.*

Plaintiff presented little evidence to establish defendant's perception about his purported disability. However, plaintiff himself testified that, when Hocking told him he was terminated because of his stroke, Hocking explained that "it would be a danger to others if [plaintiff] had a stroke on the road or something to that effect." Thus, according to plaintiff's own testimony, Hocking expressed that his concern about plaintiff having a stroke was that he might place others in danger while performing his job. Accordingly, the totality of the evidence presented about defendant's belief regarding the impact of plaintiff's "stroke" was that it would limit defendant's ability to perform his particular job. This was insufficient to establish a claim under the PWDCRA and the trial court correctly granted summary disposition to defendant. *Chiles*, 238 Mich App at 478.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly